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IN THE

Supreme Court of the United States

TERM. 1964

No. 197 [redacted]

DIAMANTE URGA,
Petitioner,

-vs-

STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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No. _____

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-vs-

STATE OF FLORIDA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

TO THE HONORABLES, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Diamante Urga, the petitioner herein, prays that a Writ of Certiorari be issued to review the final judgment and decree of the Supreme Court of the State of Florida entered in Case No. 32,839, in that Court, entitled Diamante Urga, Petitioner, vs. the State of Florida, Respondent, denying a Petition for a Writ of Certiorari to the District Court of Appeal, Second District, State of Florida, rendered on January 8, 1964, the final judgment and decree of the latter court having affirmed the judgment and sentence of the Criminal Court of Record in and for Hillsborough County, Florida. At the trial of this cause the jury returned a verdict of guilty as charged in the Information filed against her. The trial judge, under the Information, which

charged that petitioner unlawfully did certain acts with the intent to procure a miscarriage of one Helen T. Christman (Tr. 1-2), sentenced petitioner to a term of from six (6) months to five (5) years at hard labor in the State Penitentiary of the State of Florida (Tr. 222).

OPINIONS BELOW

The judgment and sentence of the Criminal Court of Record in and for Hillsborough County, Florida, has not been published in any official or unofficial report, but appears on page 222 of the Record.

The opinion of the District Cour tof Appeal, Second District, State of Florida, appears in Appendix "A", page 1, and the denial of rehearing by the District Court appears in Appendix "A", page 27, said opinion is reported in case of *Urga v. State,* 158 So. 2d 719.

The opinion of the Supreme Court of Florida appears in Appendix "A", page 28, and the denial of rehearing by the Supreme Court appears in Appendix "A", page 37, said opinion is reported in case of *Urga v. State,* ___ So. 2d ___.

JURISDICTION

The opinion, judgment and decree of the Supreme Court of Florida was rendered and entered on January 8, 1964. (Appendix "A", page 28)

Timely application for rehearing was denied on March 25, 1964. (Appendix "A", page 37)

On application of petitioner a Judge of the Criminal Court of Record in and for Hillsborough County, Florida, granted a stay of mandate to enable petitioner to apply for a Writ of Certiorari to this Honorable Court, said stay being for thirty (30) days. (Appendix "A", page 40)

The jurisdiction of this court is invoked under Title 28, United States Code, Section 1257 (3), which provides in part:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "By writ of certiorari * * * where any title right, privilege or immunity is specially set up or claimed under the Constitution, * * * or statutes of * * * the United States."

The following cases are believed to sustain the jurisdiction of this court:

New York ex el Bryant v. Zimmerman, 278 U. S. 63, 67, and cases cited;

Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 U.S. 226 at 231, 232.

The Supreme Court of the State of Florida is the highest court of the State.

QUESTION PRESENTED FOR REVIEW

Did the Supreme Court of the State of Florida, by its failure to grant petitioner's Petition for a Writ of Certiorari to the District Court of Appeals, Second District, State of Florida, which latter court confirmed the judgment and sentence of the trial court, which trial *court denied petitioner her federal and state constitutional* rights to a fair and impartial trial, when the trial court unduly limited, curtailed and restricted cross examination of the State's Chief Witness, the woman

upon whom the alleged abortion was performed, by refusing and denying petitioner the right to prove or even inquire into material matters which the accused had the right to consider, deny petitioner her rights to due process of law and equal protection of law as guaranteed and protected by the Sixth and Fourteenth Amendments to the Federal Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are the Sixth and Fourteenth Amendments which, in part, provide:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.
>
> *United States Constitution,* Amendment VI
>
> " * * * nor, shall any state deprive any person of life, liberty, or property, without due process of law." (Excerpt)
>
> *United States Constitution,* Amendment XIV.

STATEMENT OF CASE

On April 5, 1961, an Information was filed against the petitioner, in the Criminal Court of Record of the County of Hillsborough, State of Florida, charging her with unlawfully doing certain acts with the intent to procure a miscarriage of one Helen T. Christman (Tr. 1-2). Petitioner entered her plea of not guilty to said

charge and thereafter, to-wit: on the 11th day of January, 1962, said cause went to trial (Tr. 26), and the petitioner was found to be guilty of the charge lodged against her in the Information (Tr. 217).

During the course of the trial, the State had opened up the subject of the witness, Helen T. Christman's marital, employment and financial status; and, therefore it was a proper subject of cross-examination to elicit the questions hereinafter referred to during the course of said trial.

Thereafter, counsel for petitioner proffered to prove and show by questions propounded to said Helen T. Christman, the prosecutrix, if permitted, that at the time testified to about the abortion transaction with petitioner, and subsequent thereto; that said prosecutrix was married, has seperated, and had not cohabited with her husband for a period of nearly ten (10) months prior thereto; and that the father of her child was some man other than her husband, and that after her alleged pregnancy and abortion transaction, she, as Plaintiff in a certain identified divorce suit in Hillsborough County, Florida, testified falsely therein, under oath, as to certain material matters concerning her conduct and marital obligations while she was married to her husband.

The trial court also at this juncture, prohibited petitioner from going forth on cross-examination in bringing out these matters for the jury's consideration (Tr. 56-57).

The denial of said cross-examination would deprive petitioner of her rights to due process of law and equal protection of the laws as guaranteed and protected by

the Sixth and Fourteenth Amendments to the Federal Constitution and her rights set out in the case of *Coco v. State*, 62 So. 2d 892 (Fla. 1953).

Following this arbitrary denial of petitioner's rights to solicit manifestly required answers on cross-examination, petitioner was found guilty as charged in the Information (Tr. 217).

Following her conviction, petitioner duly filed a Motion for New Trial, the fourth ground of which expressly preserved and pursued the State and Federal Constitutional question presented in this Petition for a Writ of Certiorari (Tr. 218-219).

After sentence petitioner duly perfected her appeal to the District Court of Appeal, Second District, State of Florida, and the third assignment of Error in that Court again expressly preserved and pursued the Federal Constitutional question presented in this Petition for a Writ of Certiorari (Tr. 229).

Following an adverse decision by said District Court of Appeal, petitioner duly filed her Petition for Rehearing wherein it was again pointed out that the denial of petitioner's constitutional rights to a fair and impartial trial violated her Federal Constitutional rights (Appendix "A", pages 11-26).

On denial of her Petition for a Rehearing (Appendix "A", page 27), petitioner duly perfected her Petition for a Writ of Certiorari in the Supreme Court of the State of Florida.

Following the adverse decision of the Supreme Court of the State of Florida, Petitioner duly filed her Petition for Rehearing where it was again pointed out

that the denial of petitioner's constitutional rights to a fair and impartial trial violated her Federal Constitutional rights (Appendix "A", pages 29-36).

On denial of her Petition for Rehearing (Appendix "A", page 37), petitioner duly perfected her Petition for a writ of Certiorari to this Honorable Court.

FEDERAL QUESTION IN THE COURTS BELOW

A. In The Trial Court

The protection of the Fourteenth Amendment is invoked as ground four (4) of the Motion for New Trial, which reads as follows (Tr. 218):

> 4. The Trial Court denied to defendant her Constitutional right to a fair and impartial trial in that the Trial Court improperly, erroneously and prejudiciously unduly restricted defendant's right to fully cross-examine the State's main and most important witness, Helen T. Christman, by denying and refusing to permit defendant's counsel to cross-examine said State's main and most important witness concerning her background, her marital status, and her reasons for procuring the alleged abortion.

B. In The District Court Of Appeal Second District, State Of Florida

Petitioner continued to press the federal question on appeal by her formal Assignments of Error. The pertinent assignment is:

> 3. The Trial Court denied to and withheld from defendant her Constitutional right to a fair and impartial trial in that the Trial Court, during the trial, improperly, erroneously and prejudicially unduly limited, curtailed and restricted defendant's substantive right of cross-examination of the

State's main and most important witness, the prosecutrix, Helen T. Christman, by denying and refusing to permit defendants counsel to inquire from said adverse State witness and refusing to permit said adverse State witness to disclose whether she was married at the time of the alleged abortion, or had ever been married; if her name was Mrs. Christman; if she had prior to trial filed for and been granted, a divorce; her purpose for contacting the defendant; her reason for wanting to have a miscarriage and for not wanting to have a baby; whether she became pregnant after having the alleged miscarriage and was not pregnant at the time she sought out defendant; her employment status and earnings and from whom she was receiving financial assistance; and said prosecutrix having beeen put under the rule by the Court, whether she had read the transcribed testimony of any other State witness immediately prior to her testifying at the trial of the defendant.

On timely application for rehearing, petitioner again invoked the protection of the Fourteenth Amendment, on pages 11-14 therein (Appendix "A", pages 11-26).

C. In The Supreme Court Of The State Of Florida

Petitioner again pressed the federal question by her Petition for Writ of Certiorari filed in the Supreme Court of the State of Florida.

On timely application for rehearing, petitioner again invoked the protection of the Fourteenth Amendment, on pages 3-6 therein (Appendix "A", pages 29-36).

The Supreme Court of Florida entered an Order Denying Petition for Rehearing on March 25, 1964, as follows (Appendix "A", page 37):

"On consideration of the Petition for Rehearing filed by Attorney for Petitioner,

"It is ORDERED by the Court that the said petition be, and the same is hereby, denied."

D In The Trial Court

The protection of the Fourteenth Amendment was invoked once again upon Motion to Stay Mandate lodged with the Criminal Court of Record in and for Hillsborough County, Florida, on April 6, 1964 (Appendix "A", pages 38-39).

One of the Honorable Judges of said Criminal Court of Record entered an Order staying said Mandate, pending disposition of this Petition, thus acknowledging the federal question being presented to this Honorable Court (Appendix "A", page 40).

REASONS FOR GRANTING THE WRIT:

It is clear that the District Court of Appeal has decided a federal question. On page (9) of its opinion it expressly states this fact in these words (Tr. 247): (Appendix "A", pages 8-9).

> "The defendant's final contention is that she was denied a fair trial in that the court unduly limited defense counsel's cross examination of the prosecuting witness. We find, however, that the trial court merely forestalled excessive cross examination as to immaterial or collateral matters which were diversionary and not in cross of matters brought out on direct examination. See Atlantic Coast Line R. Co. v. Crosby, 1907, 53 Fla. 400, 43 So. 318, 333 which states:
>
> > ' . . . It is well settled in this court that a witness cannot be cross examined as to any fact which is collateral or irrelevant to the issue, merely for the purpose of contradicting him by other evidence if he should deny it, thereby to discredit his testimony. Fields v. State, 46 Fla. 84, 35 South. 185 and authorities therein cited.' "
>
> (Pages 9 and 10 of District Court Opinion)

The language cited in the *Crosby case, supra,* and relied on by the District Court is indisputable, insofar as it goes. But the District Court defined natural and proper inquiry on cross examination as "collateral or irrelevant." There is, of course, a fine line between and among the meanings of words, particularly within a given structural context. But it is nevertheless a matter of paramoun substance that an accused is entitled to a fair and impartial trial within the framework of the Fourteenth Amendment of the United States Constitution.

The mere dismissal of a contention or plea for constitutional rights cannot be accepted on the basis of purely semantic differentiations. There is essentially more to this situation than the simple determination of whether an inquiry is collateral or irrelevant. A person's life and liberty is the issue, and the judicial analysis should be accordingly weighed.

There is, of course, a tradition among appellate Courts to pay homage to the divers discretionary powers inherent with the trial court. What is interesting to note is that when an appellate court determines that a judgment or decree should be reversed, the appellate court finds no reluctance and is wrought by no obstacles in determining that the Court below "abused its discretion."

It may well be that this judicial approach is desirable; however, if the purpose of case law is to interpret and instruct upon the law, the shroud of judicial mystery ought to be removed at least where life and liberty are at stake. Property can usually be replaced; the time a person wrongfully spends in prison is lost forever.

So it is that in the District Court's hygenic approach to a matter of some controversy, a matter wherein public opinion is of some significance, the District Court has engaged in the usual approach to the avoidance of delving into the substance of a contorversial matter. The Supreme Court gave petitioner no succor when it denied Certiorari; thus, the deliberations of the District Court remain unsoiled, and the petitioner is confronted only with the loss of her liberties.

We most respectifully submit that this case represents more than a question of the trial court's discretion to determine simply what is and what is not admissable evidence. Neither public opinion nor the Courts should deprive a person of life, liberty, or property without due process of law; nor deny any person the equal protection of the laws. But it is apparent that by avoiding the utter and stark realities of the factual background of this case, and of the prosecutrix in particular, that by avoiding the need to grasp with an issue of national significance, the trial court denied and the appellate courts of Florida allowed to be denied the rights of petitioner to have all the facts brought before the jury and to have a fair and impartial trial within the framework of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for writ of certiorari should be granted.

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John Parkhill
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Tampa, Florida

Counsel for Petitioner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Petition for Writ of Certiorari have been served by mail upon James Kynes, Attorney General State of Florida, Attorney for the Respondent at the Capitol Building, Tallahassee, Florida this 11th day May 1964.

FRANK RAGANO

JOHN PARKHILL

APPENDIX A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED

IN THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JANUARY TERM, A. D. 1963

DIAMANTE URGA,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

Case No 3161

Opinion filed May 10, 1963.

Appeal from the Circuit Court for Hillsborough County; D. Newcomb Barco, Judge.

Manuel M. Garcia and Wm. C. Pierce, Tampa, for Appellant.

Richard W. Ervin, Attorney General, Tallahassee, and James G. Mahorner, Assistant Attorney General, Tallahassee, for Appellee.

WHITE, JUDGE.

Diamante Urga was convicted on an information charging her with performing certain acts with intent to procure the miscarriage[1] of prosecuting witness Helen T. Christman.

The defendant appeals her conviction and challenges the correctness of the trial court's rulings which

[1] Fla. Stat. §797.01 F.S.A.

(1) permitted an examining doctor to testify to statements made by the prosecuting witness out of the presence of defendant, (2) held that a sufficient predicate had been laid for medical testimony of a pathologist with reference to the analysis of a specimen, and (3) limited the cross examination of the prosecuting witness with reference to her past domestic relations. Under protested ruling (1) we accept the premise that it was error to admit the hearsay testimony of the doctor, but we find the error harmless. With respect to rulings (2) and (3), we find no error.

The defendant first contends that it was prejudicial error to admit hearsay testimony given by Dr. Henry L. Wright who had examined the prosecuting witness. Dr. Wright's testimony included his opinion that an abortion had been effected. He was permitted to testify to conversations with the prosecuting witness in which she related the details and consequences of incriminating acts ellegedly undertaken and performed by the defendant. We are constrained to the view that such testimony in criminal cases is not admissable under any recognized exception to the hearsay rule. The objectionable hearsay was, however, entirely cumulative and repetitious of other testimony in the record. The prosecuting witness testified to the same effect, and her testimony in combination with other competent evidence convincingly supports the conclusion that the defendant did perform the acts in question with the described results. See Fla. Stat. §54.23 F.S.A.;[2] Fla. Stat. §924.33 F.S.A.[3]

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[2] Harmless error; effect.—No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.

[3] When judgment not to be reversed or modified.—No judgment shall be reversed unless the appellate court after an examination of all the appeal papers is of the opinion that error was committed which injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

Cf Sea Crest Corporation v. Burley, Fla. 1949, 38 So. 2d 434.

In Sea Crest Corporation v. Burley, supra, a civil case, The Supreme Court of Florida held that certain testimony was erroneously admitted but was not harmful since the matters testified to were independently attested to by other competent witnesses. Other Florida decisions relative to the same general principle in criminal cases include Smith v. State, 1937, 129 Fla. 388, 176 So. 506, 508; and Chesser v. State, 1923, 85 Fla. 151, 95 So. 610, where the testimony notwithstanding the admission of incompettent evidence adduced by prosecution. See also Kelly v. State, 1941, 145 Fla. 491, 199 So. 764, citing Hopkins v. State, 1906, 52 Fla. 39, 42 So. 52, 55 in which it was held:

> " 'Alleged errors in giving or refusing charges or instructions, and in the admission or rejection of testimony, which do not weaken the effect of the admitted testimony, and which do not reach the legality of the trial itself will not be considered grounds for reversal where the evidence leaves no room for reasonable doubt of the defendant's guilt.' "

The present case differs significantly from Weightnovel v. State, 1903, 46 Fla. 1, 35 So. 856, on which the defendant strongly relies. That was a manslaughter case in which a statement made by the deceased to a physician out of the presence of the defendant was held erroneously admitted since no predicate had been laid for its admission as a dying declaration or as part of the *res gestae*. The conviction was reversed. In that case, however, the physician's testimony would have been essential to a conviction since the victim was dead and there was no other appreciable evidence linking the defendant with the alleged crime. In the instant case, by contrast, the physician's testimony as to statements by the prosecuting witness was not essential to conviction in view of the fact that the prosecuting witness herself gave competent testimony as to the very same facts.

Reverting to Dr. Wright's medical opinion that an abortion had been induced, we find that his opinion was supported by evidence other than the objectionable hearsay. He testified that his personal examination of the prosecuting witness disclosed excessive bleeding, infection and expansion indicating recent pregnancy. There was no error in permitting this testimony to stand.

Our courts generally have been careful to assure fair trials to defendants in criminal cases, but obviously there are some errors that do not render a trial basically unfair. Consequently the doctrine of "harmless error" has been developed by judicial decision and adopted by statute[4] to avoid reversal in cases where it appears that justice has been served and that in all probability a new trial with the same admissable evidence would not alter the end result. That is the situation here where the erroneous admission of D. Wright's hearsay testimony was not so grievous as to justify a new trial. Cf Bowden v. State, Fla. App. 1962, 137, So. 2d 621, 625; Breen v. State, 1922, 84 Fla. 518, 94 So. 383. For a brief and interesting commentary on the evolution of the harmless error doctrine see O'Steen v. State, 1927, 92 Fla. 1062, 111 So. 725, 729-730.

The defendant next contends that it was prejudicial error to permit Dr. Robert J. Davis, a pathologist, to testify to the results of his analysis of tissue purportedly taken from the body of the prosecuting witness to ascertain whether she had been pregnant. The defendant submits that the State's evidence did not establish that the specimen was taken from the prosecuting witness and did not show an unbroken chain of possession of the specimen from the time of the taking to the time of analysis.

It appears that Harriet Ward, a registered technician at St. Joseph's Hospital, assisted Dr. Frank Moorehead in taking a tissue specimen from the prosecuting witness. She testified that the specimen was placed in

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[4] Fla. Stat. §54.23 F.S.A., supra.

a container and sealed and that Helen Christman's name and age, the date, and the doctor's name were all inscribed on the container and that she took the specimen to the laboratory for analysis. She testified that she personally delivered the container to a girl in the laboratory, and that such was the customary procedure for handling specimens. Similar testimony was given by Dr. Frank Moorehead.

Dr. Robert J. Davis, pathologist in charge of the laboratory, testified that the various specimens come to him in sealed containers, that he gives them distinctive numbers which he enters in a session book corresponding to "their name" and then he examines each specimen and has it processed by his technician. Dr. Davis testified that he personally analyzed the specimen labeled "Helen Christman." At this point defense counsel objected on the ground that it appeared from the State's own evidence that there was no continuity of possession of the specimen. The objection was overruled. Continuing his testimony Dr. Davis stated that he personally removed the tissue from the container, examined it and placed a portion of it in a slide container for microscopic examination marked with the number entered in his book, and that he analyzed it as "partly product of placental tissue." The presence of placental tissue would be indicative of recent pregnancy. On cross examination Dr. Davis testified that he did not personally participate in obtaining the specimen.

In Novak v. District of Columbia, 1947, USCA District of Columbia, 160 F. 2d 588, cited by the defendant, Bernard Novak was convicted of driving an automobile while under the influence of intoxicating liquor. A police officer obtained a specimen from the defendant while he was under arrest. The defendant was not advised that this could be used as evidence against him, but he was told that if the sample was right it would be to his benefit. The defendant also was not advised that he could refuse to have the specimen taken. An expert witness testified that in his opinion the test showing .24 of 1% alcohol indicated that the defendant was intoxicated at the time of his arrest. In reversing judgment of conviction and remanding the cause for a new trial the court said:

> "It is our holding that the laboratory records and the chemist's testimony respecting the analysis were not properly admissable in evidence, because the District of Columbia failed sufficiently to identify the sample from which the analysis were made as being that sample taken from appellant. The police officer who secured the sample was present in court and testified to the manner in which he labeled the flask containing appellant's urine and how he placed his initials on the label. The chemist, when he testified, had beside him the bottle of urine on which he had made an analysis. *But no effort was made to hand to the police officer, who was present in court, the bottle the chemist had used to see if he could identify it as the bottle he had labeled and initialed.* There is missing a necessary link in the chain of identificaton." (Emphasis added)

It is apparent that the Novak holding is not authority for the proposition that every person who handles a specimen container is required to give testimony precedent to the admission in evidence of the analysis report. The case turned on the fact that the officer, who supposedly placed the specimen in the bottle, did not so testify. Thus there was no affirmative identification of the specimen of the bottle in which it was deposited. This points up a vital difference. In the present case, by contrast, the testimony plainly established that the specimen was taken and was placed in a container, sealed, fully labeled and delivered to the laboratory pursuant to customary hospital procedure.

In the same jurisdiction which rendered the Novak decision there was a later case which, we think, is more pertinent to the instant case. In Robinson, etc. v. U. S., 1960, USCA District of Columbia, 283 F. 2d 508, certain articles of clothing belonging to the defendants, together with paint chips and other debris found at the scene of an alleged burglary, were forwarded by the police to the laboratory at the Federal Bureau of Investigation. Relying on the Novak case, the defendants

contended that the government had failed to show a sufficient history of continuity of possession to justify acceptance of the articles as exhibits in evidence. Holding that the evidence of continuity of possession was "reasonably adequate under the circumstances," the court said:

> " . . . In the present case, the Government's showing of continuity of possession was reasonably adequate, under the circumstances, *although not every person who might have had access to the exhibits was called to the stand.* Little or nothing turned on the precise nature of the custody of the articles, since their identity and the results of the tests were proved by clear and unchallenged testimony. That the appellants were in possession of property taken from the stolen safe was plainly established. The exhibits, in contrast to Novak, were far from being an essential part of the Government's case. *No evidence was offered by the defense suggesting any laxity in the custodial or laboratory procedures of the Government, or any reason why the exhibits should be regarded as in any way untrustworthy.* Appellant's contention must be rejected. See, generally, Pasadena Research Laboratories, Inc. v. United States, 9 Cir., 169 F. 2d 375, certiorari denied 1948, 335 U. S. 853, 69 S. Ct. 83, 93 L. Ed. 401." (Emphasis supplied)

Another case cited by the defendant is Brown v. State, 1951 Texas 240 SW 2d 310. Brown was arrested for driving while intoxicated and was taken to a hospital where a nurse took a specimen of his blood to be analyzed for trial purposes. The nurse did not testify at the trial and the appellate court, on reviewing Brown's conviction, found that the evidence did not provide sufficient assurance that the specimen taken was the same specimen that was forwarded by a hospital physician to the Department of Public Safety for analysis. The judgment of conviction was reversed. The opinion in this Texas case cannot be properly evaluated without reviewing its analysis by the same judge in the subsequent case of Ray v. State, 1961 Texas, 343 SW 2d 259.

In the latter Ray case the court pointed out that the specimen in the Brown case was marked only by the initial "N" and the last name "Brown," which was a common name; that "Brown" did not testify; that on the other hand, in the Ray case then under consideration, the defendant testified and stated that a specimen of his blood was taken and that he had requested it. The blood was extracted in the emergency room and taken to the laboratory where it was tested. It was identified by an attached report as "Blood of Jesse E. Ray" and the analysis report was admitted in evidence. Judgment of conviction was affirmed, thus demonstrating once again that circumstances alter cases.

From the foregoing treatment of this phase of the defendant's appeal, we conclude that the analysis report and relevant testimony of the examining pathologist were admissable. Identification and continuity of possession were sufficiently established, affording ample assurance of the authenticity of the specimen and the analysis. It is notable in this connection that although it was proper to cross examine thoroughly with reference to the analysis, proof of pregnancy of the prosecuting witness was not a matter of vital necessity to the State's case. This is so because pregnancy of the "victim" is not an essential component of the statutory offense charged in the information. See Urga v. State, 1944, 155 Fla. 86, 20 So. 2d 685, 687; Eggart v. State, 1898, 40 Fla. 527, 25 So. 144, 149.

The defendant's final contention is that she was denied a fair trial in that the court unduly limited defense counsel's cross examination of the prosecuting witness. We find, however, that the trial court merely forestalled excessive cross examination as to immaterial or collateral matters which were diversionary and not in cross of matters brought out on direct examination. See Atlantic Coast Line R. Co. v. Crosby, 1907, 53 Fla. 400, 43 So. 318, 333 which states:

> " . . . It is well settled in this court that a witness cannot be cross examined as to any fact which is collateral or irrelevant to the issue, merely for the

purpose of contradicting him by other evidence if he should deny it, thereby to discredit his testimony. Fields v. State, 46 Fla. 84, 35 South. 185 and authorities therein cited."

Inquiries concerning the former married life and divorce of the prosecuting witness were intended to question whether the witness had been impregnated by a man other than her husband and whether she had given false testimony in her divorce proceeding. For impeachment purposes, the defendant intended to introduce certain testimony from the witness' divorce proceeding from which the following portion is pertinent:

Q. "And do you feel that you were a good wife toward the defendant?"

A. "Yes."

The alleged false testimony was the answer "Yes." This answer being directed to the subjective thoughts and feelings of the witness would not be susceptible of proof or disproof.

It is perhaps understandable that the defense, in the zeal of defensive cross examination, would attempt to weaken the State's case by insinuations and reflections on the character of the prosecuting witness to the point of suggesting or even establishing an illicit conception; but proper impeachment would be directed to the credibility of the witness rather than to former misconduct of a different category, and a proper predicate would be required. When prior actions of a witness, or of the accused, are not reasonably relevant and material to the pending charge against the accused, such actions may not be made the basis of proof for impeachment purposes. Cf Gafford v. State, 1920, 79 Fla. 581, 84 So. 602; Wallace v. State, 1899, 41 Fla. 547, 26 So. 713, 722. See also Roberson v. State, 1898, 40 Fla. 509, 24 So. 474, 477 where the court restated the general rule that evidence of particular acts of misconduct cannot be introduced to impeach the credibility of a witness. We

conclude that the trial court did not err in limiting the cross examination under these circumstances. To permit it to go further in the direction indicated would belabor the record with excessive innuendo and immateriality. See Atlantic Coast Line R. Co. v. Holliday, 1917, 73 Fla. 269, 74 So. 479, 484.

A judgment of conviction is genrally sustained on appeal unless the record reveals error so prejudicial to a fair trial as to impel a reversal. The instant trial was free of harmful error, so the verdict and judgment will not be disturbed.

Affirmed.

KANNER, A. C. J., and HORTON, MALLORY, ASSOCIATE JUDGE, CONCUR.

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

DIAMANTE URGA,
Appellant,
v. CASE NO. 3161
STATE OF FLORIDA
Appellee.

PETITION FOR REHEARING

To the Honorable District Court of Appeal, Second District, State of Florida:

The Petitioner, DIAMANTE URGA, files this her Petition for Rehearing and respectfully requests this Honorable Court to reconsider its decision filed herein on May 10, 1963, affirming the Judgment and Sentence of said lower Court, and grant unto Petitioner a rehearing in said cause and, for grounds for said rehearing, respectfully shows unto the Court as follows:

I.

In holding that the Trial Judge did not err when it permitted a medical doctor to testify as a State witness, over Defendant's objections, as to conversations he had with, and statements made to him by, the woman upon whom the alleged abortion was performed, all being made in the absence of the accused, relating the woman's story as to a past and therefore a transpired event, and occurrences concerning the entire abortion transaction involving the woman with the accused, this Honorable Court apparently *overlooked and failed to consider* the overwhelming weight of authority, as well as the Florida law, as stated in 31 C.J.S. §246, p. 995-996, 20 Am Jur §628, p. 531, Wharton's Criminal Evidence, 11th Edition, V. I, § 515, p. 815, *Jones v. Terminal RR Association*, 246 S.W. 2d 356, and *Weightnovel v. State*, 46 Fla. 1, 35 So. 856. These, and other citations and cases, stand for the proposition of law that:

> "Statements by an injured or deceased person as to his condition or symptoms are purely hearsay and therefore inadmissable. even though made to a physician on an examination for the purpose of treatment." Wharton's Criminal Evidence. 11th Edition, V. I, §515, p. 815.

Instead, this Court has relied as its authorities and in support of its decision in this cause, on the cases of *Seacrest Corp. v. Burley,* 38 So. 2d 434, *Smith v. State,* 176 So. 506, *Chesser v. State,* 95 So. 610, *Kelly v. State,* 199 So. 764, and *Hopkins v. State,* 42 So. 52.

The first case cited by the Court is that of *Seacrest Corp. v. Burley,* supra, which was a civil case for personal injuries, resulting from an automobile accident. In that case, the defendant had made certain statements as to the nature and cause of the accident, rate of speed, etc., which were overheard by a patrolman. The patrolman was called upon to testify as to these statements made by the defendant. The introduction of said testimony was objected to on the grounds that the same was not part of the *res gestae,* and was prejudicial and improper. In affirming the lower Court's ruling, the Supreme Court of Florida stated:

> "Our study of the challenged evidence discloses that the purported admissions testified to *were established by other witnesses* appearing for the Plaintiff and therefore are cumulative. It can not be said that the evidence was prejudicial to the appellant and in light of all the circumstances, if it was error, it can not be said that it was harmful." Emphasis supplied.

It is noteworthy to point out that the Seacrest Corp. case, supra, is a civil case as against a criminal case, as is the case at Bar. It is also to be noted that in the Seacrest case the statements introduced and objected to were statements made by the defendant himself, which is substantially different from having a State witness testifying to statements, made not by the defendant,

but by the alleged victim or complaining witness, as in the case at Bar. In the Seacrest case, as the Court so pointed out, the purported admissions testified to were established by other *witnesses,* which further differentiates it from the case at Bar. In the case at Bar, the only other witness to testify as to admissions of the complaining witness was Doctor Henry Wright. There were no other "corroborating" witnesses. Petitioner has no quarrel with the opinion rendered by the Supreme Court in the Seacrest case, but she does contend that said holding and opinion is not governing the case at Bar, since these two cases are on different plateaus of evidentiary proof, as well as factually incomparable. In the case at Bar, there was no "cumulative" testimony. Therefore, the Seacrest case is not decisive of any issues raised in the case at Bar.

The next case cited is that of *Smith v. State,* 1937, 129 Fla. 388, 176 So. 506-508. This case, as well as the remaining Florida cases involving criminal matters cited in support of its conclusion by this Court, can not justifiably be construed as governing authorities with respect to the admissibility of hearsay testimony constituting harmless error. The reason for this being that in the Smith case, supra, the defendant testified in his own behalf and, accordingly, that Court stated:

> "Aside from this, however, if error had been committed in the reception of testimony, it became harmless when *defendant took the stand* as a witness in his own behalf and *testified to such state of facts as clearly showed him guilty of murder in the first degree.*"
>
> * * *
>
> "Again, however, we may say that, if there had been error in admitting the alleged confession, *it became harmless when the defendant took the stand and testified as he did.*" Emphasis supplied

In the case at Bar, the Defendant did not take the stand and, therefore, did not "testify to such state of facts as clearly showed her guilty" of the charge lodged against her.

As authority for its decision that the testimony given by Doctor Henry Wright, concerning conversations with the prosecuting witness, out of the presence of the Defendant, was hearsay, but entirely cumulative, repetitious, and therefore harmless, it cited the case of *Chesser v. State,* 95 So. 610, where this Court stated that the testimony of the accused was held sufficient to sustain his conviction, nowithstanding the admission of incompetent evidence adduced by the prosecution. A reading of the very brief opinion in the Chessar case points out that *the defendant also testified as a witness in his own behalf.* The Court, in affirming the judgment of conviction in the lower Court, held as follows:

> "In this situation he is in no position to find fault with rulings, even though technically erroneous, excluding or admitting evidence of a character involved here. The principle is well established that a judgment of conviction will not be reversed, even if technical errors were committed in rulings on the admissibility of evidence, *where the evidence of guilt is ample and no fundamental rights of the defendant are infringed.*" Emphasis supplied.

The Chesser case is no authority upon which to affirm the lower Court's decision in the case at Bar. As it has been pointed out, the defendant in the Chesser case testified in his own behalf; your Petitioner in the case at Bar did not testify. In the Chesser case, evidence was introduced and objected to by the defendant, which went to the question of the reputation of the deceased. The Court allowed said testimony to be introduced and stated that such was harmless error, since *the defendant in that case did not suffer any injury from the admission of this testimony.* In the case at Bar, it is obvious that said evidence was not only erroneous, but was of a prejudicial character, and being such, the fundamental rights of your Petitioner as guaranteed to her by the Federal as well as the State Constitutions, were infringed. In the Chesser case, from the reading of the opinion, one is led to believe that *there was ample evidence of guilt of the defendant* and, combined with that

quantity of evidence of guilt, the introduction of the testimony which the Court held to be harmless error did not violate any of the fundamental rights of the defendant in that case. This was not so in the case at Bar and, accordingly, the Chesser case cannot be said to have any decisive weight in the decision of the case at Bar.

In the cited case of *Kelly v. State,* 199 So. 764, a reading of the opinion points out that the said assigned error was the lower Court's refusal to charge the jury of a defendant's requested charge on the law of self-defense. In said case, the defendant also testified in his own behalf, in order to substantiate self-defense. In the Kelly case, the Court stated:

> "The error, if any, not shown to be prejudicial is not ground for reversal."

and the proposition of law stated in the Kelly case, citing *Hopkins v. State,* which this Court has applied in support of its holding, reads as follows:

> "Alleged errors in giving or refusing charges or instructions, and in the admission or rejection of testimony, *which do not weaken the effect of the admitted testimony,* and which do not reach the legality of the trial itself, will not be considered grounds for reversal *where the evidence leaves no room for reasonable doubt of defendant's guilt."* Emphasis supplied

The rule of law as aforesaid stated and cited in the Kelly case, was applicable only to a requested charge that the Trial Court refused. In the Kelly case, as to the testimony which was alleged to have been received in evidence erroneously, the Court stated:

> "In this regard, it is our conclusion from a consideration of the testimony which was elicited by the alleged improper question propounded to the witness Eva Ellarbee, that *such testimony was favorable to the defendant, and, therefore, could not be held to have prejudiced him."* Emphasis supplied

In the Kelly case, therefore, the testimony that was alleged to have been admitted into evidence improperly, the Court concluded that said testimony could only be favorable to the defendant and, therefore, not prejudicial. Obviously, in the case at Bar, the admitted erroneous and hearsay testimony introduced against your Petitioner was not only prejudicial, but by no stretch of the imagination could said testimony have been favorable to her. Therefore, the principles of law as stated in the Kelly case and used as authority in the case at Bar by the Court were not applicable to the case at Bar, since the facts and issues in the case at Bar are not comparable to those in the Kelly case.

The final case, *Hopkins v. State,* 52 Fla. 39, 42 So. 52-55, a reading of the opinion in said case, the Court states:

> "The evidence leaves no room for reasonable doubt of Hopkins' guilt. *The jury could not have acquitted the defendant without disregarding their oaths.* The testimony we have referred to was all legal and proper. Such errors, if they existed, would be errors without injury." Emphasis supplied

In the case at Bar, the testimony which was introduced over Petitioner's objection was unlike the testimony introduced in the Hopkins' case, in that said testimony in the case at Bar the Court had ruled that the same constituted hearsay and was not admissable under any of the recognized exceptions to that rule. Therefore, the Hopkins case, supra, is not authority and can not be used as support for its holding by the Court herein.

In attempting to differentiate the case at Bar from that of *Weightnovel v. State,* as cited in 46 Fla. 1, 35 So. 856, and relied upon by your Petitioner for reversal, the Court *overlooked and failed to consider* that the Weightnovel case, supra, was the only controlling and authoritative case which the Court was duty bound to consider and apply in reversing the case at Bar. We respectfully submit that the rule laid down by the Supreme Court

of the State of Florida in the Weightnovel v. State case, cited here, wherein the Court stated the declarations of the deceased were not a part of the res gestae, and because they related to a transaction that occurred a week prior, that the same was a past and accomplished transaction, and that any admission of said statements by any State witness, when the defendant was not present at the time of making said statements, *that said admission into evidence was a material error and necessitates a reversal of the judgment.* The Weightnovel case is not only applicable, but is controlling of the instant case at Bar. In the case at Bar, the Court made an attempt to distinguish this case with the Weightnovel case, by injecting the fact that in the Weightnovel case the victim was deceased and, therefore, the testimony of the doctor was essential for a conviction, since there was no other appreciable evidence linking the defendant with the alleged crime. Petitioner contends that said Court in so doing has *overlooked and failed to consider* the general principle of law, as stated:

> "Statements by an injured or deceased person as to his condition or symptoms are purely hearsay and, therefore, inadmissable, even though made to a physician on an examination for the purpose of treatment." Wharton's Criminal Evidence, 11th Edition, V. I, Sec. 515, p. 815.

We respectfully submit that this Honorable Court *overlooked and failed to consider* that the rule laid down in the Seacrest case, supra, by the Supreme Court of Florida, is not applicable to the case at Bar, for the reason that in the Seacrest case, the statements being introduced were made by the defendant himself, and that said cause was civil, whereas in the case at Bar, the evidence introduced was admittedly hearsay and erroneous since the testimony adduced were statements made by the complaining witness to a doctor, and that doctor testifying to those statements made by the complaining witness out of the presence of the Petitioner, therefore constituting reversible error.

We further submit that this Honorable Court overlooked and failed to consider that the cases cited by the Court and relied upon in arriving at its decision, are not applicable and controlling of the instant case for the obvious reason that the Petitioner herein never did take the witness stand in her own behalf and that in all of said cited cases relied upon by this Honorable Court, the defendants did take the witness stand and testify in their own behalf, thereby leading the Courts in each of the cases to reason that because of the said defendants testifying in their own behalf, that any error by the admission of hearsey testimony, which would have constituted prejudicial error, was harmless error.

We submit that if the rule and the law laid down by the Supreme Court of Florida, in the Weightnovel case, is applied to the facts in the case at Bar, then, it becomes apparent that this Honorable Court erred in affirming the decision of the lower Court.

II.

In holding that the Trial Court did not commit prejudicial error when it permitted a medical doctor to testify as a State witness, over defense objections, as to the results of a pathological analysis made of a specimen of human tissue without proof that said specimen was taken from the victim of an alleged abortion, and further without requiring the State to show a continuous or even a connected chain of possession and condition of said specimen from the time of taking the analysis, this Honorable Court overlooked and failed to take into consideration the clear and convincing language found in 20 Am Jur, 1962 Cumulative Supplement, Sec. 758, page 139, stating as follows:

> "When an object, specimen or part taken from a human body is analyzed or examined by an expert in his laboratory and is made the basis for the testimony or report of the expert or officer, the identity of the object, specimen or part must be proved. The identity to be proved is that of the thing, speci-

> men or part taken out to be tested with the thing analyzed, and in some cases the identity of the thing taken with the thing produced must be proved. *Proof* of identity involves showing that *the thing was taken from the particular body from which it was supposed to be taken*, and that thereafter it was *properly kept* and, if necessary, transported *and delivered to the expert who made the analysis* or examination." Emphasis supplied

and the case of *Novak v. District of Columbia*, 160 F. 2d 580, which case was upheld and affirmed in the case of *Robinson v. U.S.A.*, 1960, USCA, District of Columbia, 283 F. 2d 508; the Robinson case, supra, being cited as authority by this Court in its opinion.

> The Novak case, supra, held as follows:
> " * * * The chemist, when he testified, had beside him the bottle of urine on which he had made an analysis, but no effort was made to hand to the police officer, who was present in Court, the bottle the Chemist had used to see if he could identify it as the bottle he had labeled and initialed. There is missing a necessary link in the necessary chain of identification. The judgment is reversed * * * "

In holding that the Trial Court committed no prejudicial error when it failed to require the State to show continuous or even a connected chain of possession and condition of a specimen obtained from the alleged victim of an abortion, this Court apparently *overlooked and failed to consider* that the Robinson case, supra, in its entirety and for what authority that case stands. This Honorable Court *failed to consider* that the Novak case, supra, is upheld and affirmed in the Robinson case, and that in the Robinson case, the Court distinguished the *facts* from the Novak case and did not state another principle of law. It is also noteworthy, which this Court apparently overlooked, that the evidence objected to was of a different nature in the Robinson case, than that in the Novak case. In the Novak case, we had blood speciments, whereas in the Robinson case we had introduction of items of clothing. As is readily apparent in the Novak case, wherein blood specimen was introduced

over Defedants objection, it is analogous and closely associated with the introduction in the case at Bar of a human specimen of tissue identified as the placenta. Petitioner has no quarrel with the Robinson case and its holdings, but she maintains that the facts are substantially different in the case at Bar, and that the items are of such a nature as to convey a different import in the introduction of said evidence. As was quoted in the Robinson case, supra:

> *"Little or nothing turned on the precise nature of the custody of the articles* since their identity and the results of the tests were proved by clear and unchallenged testimony, the exhibits, in contrast to Novak, *were far from being an essential part of the Government's case."* Emphasis supplied

Petitioner maintains that the inroduction of said testimony was not only material, but said testimony and evidence introduced through a doctor who had examined the alleged victim, give it a most significant evidentiary value in support of the Government's case, contrary to the Robinson case.

In the case of *Ray v. State,* 343 S.W. 2d 259, a Texas case, cited with approval and relied upon as authority by this Court in support of its opinion that the admission of evidence by the testimony of Doctor Henry Wright, as to his findings of a human specimen purportedly being that of the complainant witness, the Court overlooked and failed to consider that in trying to distinguish the case of *Ray v. State,* supra, from the case relied upon by Petitioner, that said testimony and evidence was inadmissible, that is, the case of *Brown v. State,* 240 S.W 2d 311, that in the Ray case, the Court affirmed and approved as authority for the proposition of the case at Bar, the principle stated in the Brown case. Quoting from the opinion in the Ray case, supra, it is stated:

> "Brown v. State, 156 Tex. Cr. R. 144, 240 S.W. 2d 310, relied on by appellant, may be distinguished. In that case the officer saw blood extracted from

> Brown, who had been taken to the hospital for that purpose. The blood sample was sent to Austin by a physician who found it in the refrigerator and mailed it to Austin for analysis. The doctor was not present when the blood was drawn and testified that all he knew about the blood was what he had been told. *No Hospital records were offered. There was no locked receptacle to safeguard blood samples* * * * " Emphasis supplied

This Honorable Court overlooked and failed to consider that the continuity of possession was not sufficiently established, as the record indicates that one Harriet Ward, a registered medical assistant to the doctor who removed the specimen, testified, in essence, that she had taken the specimen to the fourth floor to the pathology lab and left it with a person unknown to her, whose duty it was to be a secretary. She further did not know what she did with the container, and that she had not seen the container any further. Then, Doctor Davis, the pathologist, stated that he analyzed a specimen left at his laboratory, with the name of Helen Christman. Doctor Davis, then testified that he had assigned a technician in his office to process the tissue (R. 197-200). And, in accordance with the opinion as stated in the Ray case, supra, in the case at Bar no hospital records were offered, the secretary to whom this bottle containing the specimen was delivered by Harriet Ward was not called upon to testify, nor was the technician called as a witness, thereby failing to meet and comply with the elementary and uniformly followed applicable rule of law governing the admissibility of such evidence, namely, that the identity, possession and condition of the thing taken and analyzed must be accounted for by a continuous or connected chain of competent evidence from the time of taking the analysis. See 20 Am Jur, 1962, Cumulative Supplement, Sec. 758, page 139.

III.

This Honorable Court in its opinion in the case at Bar held that the Petitioner was not denied a fair trial by the Trial Court when it denied counsel for Petitioner's

the right to ask on cross-examination from the State's chief witness, the prosecuting witness, questions concerning material matters which the accused had the right to have the jury consider, thereby denying her her constitutional rights to a fair and impartial trial. In so doing, this Honorable Court *apparently overlooked and failed to consider* that the proffered cross-examination of this witness concerned matters brought out on direct examiniation and, therefore, proper subject of cross-examination.

> As stated in 98 *C. J. S.* Witnesses, Sec. 393, page 168 "Where the direct examination opens a *general subject* the cross-examination may go into *any* phase of that subject. Accordingly, the witness may be cross-examined as to matters pertinent to and growing out of or connected with matters elicited on his direct examination."
>
> * * * * *
>
> "The testimony in chief for the purpose of determining the proper scope of cross-examination consists of not only the bare facts brought out, *but in addition includes all inferences or deductions which may be made from them.*"

This Honorable Court apparently failed to consider that the questions proffered and the testimony to be elicited by the cross-examination of the prosecuting witness were pertinent to and grew out of and were connected with the very subject matters that were elicited by the State on direct examination and, thereby constituted proper cross-examination of said witness, when tested by the applicable rules of law heretofore stated.

In support of its holding, this Honorable Court relied on the authorities of *ACL RR Co. vs. Crosby,* 1907, 53 Fla. 400. 43 So. 318, *Gafford vs. State,* 1920, 79 Fla. 581, 84 So. 602; *Wallace vs. State,* 1899, 41 Fla. 547, 26 So. 713; *Roberson vs. State,* 1898, 40 Fla. 509, 24 So. 474, 477, and, *ACL RR Co. v. Holliday,* 1917, 73 Fla. 269, 74 So. 479.

In the Crosby case, supra, cited by this Court as authority in its holding, this Honorable Court failed to consider that in the case at Bar, we have one of a criminal nature, and that the Crosby case was one of a civil nature involving a railroad accident. In the Crosby case, numerous witnesses testifying as to the sound of the whistle, the facts surrounding the accident, and other testimony from eye witnesses, but contrary to this, in the case at Bar we have one solitary witness whose credibility and whose testimony and its credibility is of extreme importance and necessity in the prosecution of the charge against your Petitioner. It was, therefor, necessary, and counsel for Petitioner was duty bound to question this witness as to her credibility and then submit said issue to the jury. It is Petitioner's contention that the *ACL RR Co. vs. Crosby* case, supra, is not authority and was improperly relied upon in the opinion rendered by this Honorable Court.

In the case of *Gafford vs. State,* supra, cited by this Court as authority, it can be distinguished from the case at Bar, and therefore, not controlling, in that the Gafford case, we had a situation where the defense was trying to interject commission of other crimes wholly irrelevant and immaterial to the charge for which the Defendant, Gafford, was charged. The witness whose testimony was attempted to be impeached in the Gafford case, was a witness who was called upon to testify as to the general reputation of the Defendant for truth and veracity, that is a character witness. To distinguish the case at Bar with the Gafford case, in the case at Bar the credibility of the prosecuting witness, the alleged victim, is imperative and subject to close scrutiny. In the Gafford case, the witness was not essential and material to the charges and proof of the charges against Gafford. Therefore, the Gafford case is substantially different and distinguishable from the case at Bar, and, therefore, not authority for this Court upon which to have based its decision.

This Honorable Court cited the Wallace case and the Roberson case, supra, in support of its holding that the Trial Judge did not commit prejudicial when it restricted

Petitioner's right to cross-examine the complaining and prosecuting witness as to matters which would bring forth her credibility for the jury's consideration. The Wallace and the Roberson cases are factually different and, therefore, the legal principal enunciated in those cases are not to be applied as the governing rules in the case at Bar, as this Honorable Court did. This Honorable Court *overlooked and failed to consider* that in the Wallace and in the Roberson cases the Defendant had testified in his own behalf, and that the Government tendered evidence by cross-examination to show facts amounting to a distinct and seperate crime and having no bearing whatsoever on the crime for which the Defendants were being tried in said cases. The Court held that under these circumstances, said testimany was not admissible and, therefore, testimony could not be offered which had no materiality to the crime for which the Defendants in those cases were being tried.

Here in the case at Bar, we have a completely different factual situation in that the Defendant did not take the witness stand, and that the credibility of the prosecuting witness was ever so important, since her testimony, and her testimony alone, could have influenced the jury in its decision, without taking into consideration any other witness that testified in the case at Bar.

Petitioner has no quarrel with the Holiday case, supra, but that the same is not controlling in the case at Bar. In the Hollida ycase, we have another negligence case wherein there is a discrepancy as to the testimony given by numerous witnesses. In its opinion in the Holliday case, the Court cites the case of *Hartford Fire Insurance Company vs. Brown,* 60 Fla. 83, 53 So. 838, and states:

> "No error is committed by the Trial Court in refusing to permit a witness, on cross-examination, to answer a question which is not in cross of any matters elicited on the direct examination and when the answer thereto whichever way it might be would not to prove the issues as made by the pleadings."

It is Petitioner's contention that this Court *failed to consider and overlooked the fact* that the testimony proffered to be elicited from the complaining witness was brought out by inferences innuendos on direct examination and, therefore, subject to proper cross-examination by the Petitioner in the lower Court. In so restricting and denying your Petitioner of her right to cross-examine the complaining witness on the matters proffered, this Honorable Court failed to consider and overlooked the case of *Embray vs. Southern Gas & Elect. Corp.*, 63 So.2d 258, wherein the Florida Supreme Court stated on page 262, as follows:

> "Though it cannot be doubted that the cross-examination of a witness should always be relative to the subject of the main inquiry, it is equally plain that it should not be limited or confined to the *identical* details testified in the chief, but should extend to its entire subject matter and all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief by the witness on cross-examination."

and as stated in the *Coco vs. State*, Florida, 62 So.2d 892:

> "Cross-examination of a witness upon the subject covered in his direct examination is an *invaluable right* and when it was denied to him it cannot be said that such ruling does not constitute harmful and fatal error." See also *Luette vs State*, 152, Fla. 495, 112 So.2d, 168. (Emphasis Supplied)

WHEREFORE, Petitioner respectfully prays that this Honorable Court will reconsider its decision of May 10, 1963, in the above-entitled cause, and upon said reconsideration, will grant unto your Petitioner a rehearing and remand this cause to the lower Court for a new Trial.

Respectfully submitted

HENRY GONZALEZ

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard Ervin, Attorney General, and James G. Mahorner, Assistant Attorney General, Tallahassee, Florida, by mail, on this the 24th day of May, 1963.

_____

Attorney

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
IN AND FOR THE SECOND DISTRICT

JANUARY TERM, A. D. 1963

WEDNESDAY, JULY 3, 1963

DIAMANTE URGA,

Appellant,

v.

CASE NO. 3161

STATE OF FLORIDA,

Appellee.

Counsel for Appellant having filed in this cause a Petition for Rehearing and the same having been considered by the Court, it is

ORDERED that the said Petition be and the same is hereby denied.

A TRUE COPY
TEST:

/s/JOSEPH E. XXXXX

Clerk, District Court of Appeal

Second District

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1963

WEDNESDAY, JANUARY 8, 1964

EXHIBIT "A"

DIAMANTE URGA, ••
Petitioner ••
vs. •• CASE NO. 32,839
THE STATE OF FLORIDA, ••
Respondent ••

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal, Second District of Florida, in said cause bearing date May 10, 1963, and record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy
TEST:

/s/ Guyte P. McCord
Guyte P. McCord
Clerk Supreme Court,

IN THE

SUPREME COURT OF THE STATE OF FLORIDA

DIAMANTE URGA,

Petitioner,

vs. Case No. 32839

STATE OF FLORIDA

Respondent.

PETITION FOR REHEARING

To The Supreme Court of the State of Florida:

Petitioner, DIAMANTE URGA, files this her Petition for Rehearing, respectfully requesting this Honorable Court to reconsider its denial of Petitioner's Petition for a writ of Certiorari filed on January 8, 1964, and grant unto Petitioner a Rehearing in this cause, and for grounds for said Rehearing respectifully shows unto the Court as follows:

I.

That this Court by denying Petitioner's Petition for a Writ of Certiorari completely overlooked and failed to consider the case of *Weightnovel v. State,* 46 Fla. 1, 35 So. 856. In the case at Bar, This Honorable Court apparently failed to consider that hearsay testimony was elicited and allowed to be brough into evidence as a part of the proceedings. The identical question of law was presented before this Court in the *Weightnovel Case, supra,* which case was relied upon by your Petitioner for reversal and, said case being the only controlling and authoritative case which the Court was duty bound to consider and apply, so as to entitle your Petitioner to a Writ of Certorari in the case at Bar.

Petitioner respectfully submits that the rule laid down by this Court, The Supreme Court of the State of Florida, in the *Weightnovel case,* wherein this Court stated that declarations of a deceased person were not a part of the res gestae, and because they related to a transaction that occurred a week prior, that the same was a part and accomplished transaction and that any admission of said statements by any state witness, when the Defendant was not present at the time of making said statements, *that said admission into evidence was a material error and necessitates a reversal of the judgment.*

Petitioner contends that the *Weightnovel case* is not only applicable, but is controlling of the instant case at Bar. In the case at Bar, there was an attempt made by the State to distinguish said case from the *Weightnovel case* by injecting the fact that in the *Weightnovel case* the victim was deceased and, therefore, the testimony of the doctor was essential for conviction, since there was no other appreciable evidence linking the Defendant with the alleged crime.

Petitioner contends that in denying her petition for a Writ of Certiorari, this Honorable Court has overlooked and failed to consider the general principle of law stated as follows:

> "Statements by an injured or deceased person as to his condition or symptoms are purely hearsay and, therefore, inadmissible, even though made to a physician on an examination for the purpose of treatment." Wharton's Criminal Evidence, 11th Edition, V.I, Sec. 515, p 815.

It is Petitioner's contention that the admission of hearsay testimony given by the doctor in the case at Bar, and this Honorable Courts denial of Petitioner's Petition for a Writ of Certiorari having affirmed the introduction of said testimony into evidence, was not only prejudicial error, but also indicates that the Court overlooked and failed to consider the general priciple of law as stated in Wharton's Criminal Evidence, 11th Edition, V.I, Sec. 515, P. 815, as set forth hereinabove.

This Honorable Court, in denying Petitioner's Petition for a Writ of Certiorari, has apparently relied on the authorities of *Seacrest Corp. v. Burley* 38 So.2d 434, *Smith v. State,* 176 So. 506, *Chesser v. State,* 95 So. 610, *Kelly v. State,* 199 So. 764, *Hopkins v. State,* 42 So. 52, *Smartt v. State,* 80 S.W. 586, *Jalbert v. State,* 95 So.2d 589, and *Land v. State,* 59 So.2d 370.

Petitioner further submits that this Honorable Court overlooked and failed to consider that the cases cited by Respondent's Brief in opposition to Petitioner's Petition for a Writ of Certiorari, which this Court obviously considered and relied upon in its denial of Petitioner's Petition for a Writ of Certiorari, are not applicable and controlling of the instant case at Bar for the obvious reason that the Petitioner herein never did take the witness stand in her own behalf. In the majority of the cases cited by the Respondent, the defendants did take the witness and testified in their own behalf, thereby leading the Courts in each case to reason that because of the defendant's testifying in his own behalf, that any error committed by the admission of hearsay testimony which would have constituted prejudicial error, was harmless error. Other cases so cited by the Respondent, which this Court has apparently affirmed by its denial herein, are cases from other jurisdictions and should not be controlling in the face of the *Weightnovel case,* which case is relied upon by your Petitioner as applicable and controlling in the case at Bar.

We therefore submit that if the rule and the law laid down by this Honorable Court in the *Weightnovel case* is applied to the facts in the case at Bar, then, it becomes apparent that this Honorable Court erred in denying Petitioner's Petition for a Writ of Certiorari.

II.

This Honorable Court in its denial of Petitioner's Petition for a Writ of Certiorari, in effect, holds that your Petitioner was not denied a fair and impartial trial by the Trial Court when it denied counsel for Petitioner the right to ask, on cross examination, of the State's

chief witness, the prosecuting witness, questions concerning material matters, which the accused had the right to have the jury consider, thereby denying petitioner her constitutional rights to a fair and impartial trial. In so doing, this Honorable Court has apparently overlooked and failed to consider that the proffered cross examination of this prosecuting witness concerned matters brought out on direct examination and, therefore, proper subject of cross examination. See 98 C.J.S., "Witnesses", Section 393, page 168. In so denying Petitioner's Petition for a Writ of Certiorari, this Honorable Court apparently relied on the authorities cited by the Respondent's Brief, citing the cases of *Urga v. State,* 155 Fla. 86, 20 So.2d 685, and *Eggart v. State,* 40 Fla. 527, 25 So. 144.

It is Petitioner's contention that this Honorable Court failed to consider and overlooked the fact that the testimony proffered to be elicited from the complaining witness in the case at Bar was brought out by inferences and innuendoes on direct examination and, therefore, subject to proper cross examination by counsel for Petitioner in the lower Court. In so restricting and denying your Petitioner of her right to cross examine the complaining witness on the matters proffered, this Honorable Court failed to consider and overlooked the case of *Embray v. Southern Gas & Elec Corp.,* 63 So.2d 258, wherein this Honorable Court stated on page 262, as follows:

> "Though it cannot be doubted that the cross examination of a witness should always be relative to the subject of the main inquiry, it is equally plain that it should not be limited or confined to the *identical* details testified in the chief, but should extend to its entire subject matter and all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief by the witness on cross-examination."

We submit that the Holding of this Honorable Court that the Trial Court's restriction and denial of

your petitioner her right to cross examine the prosecuting witness on the matters proffered was not error, is in direct conflict with the decision of this Court in the case of *Embray v. Southern Gas & Electric Corp.*, 63 So.2d 258

The holding in the case at Bar is also in direct conflict with the decision of this Honorable Court in the case of *Coco v. State,* 62 So. 2d 892, as stated in the following language:

> "* * * It is too well settled to need citation of authority that a fair and full cross-examination of a witness upon the subjects opened by the direct examination is an absolute right, as distinguished from a privilege, which mus talways be accorded to the person against whom the witness is called and this is particularly true in a criminal case such as this wherein the defendant is charged with the crime of murder in the first degree. For the sake of emphasis we make the observation that at the time of the proposed cross-examination appellant stood in jeopardy of being convicted of such capital offense. Cross-examination of a witness upon the subjects covered in his direct examination stems from the constitutional guaranty that an accused person shall have the right to be confronted by his accusers.
>
> We quote with approbation from the Supreme Court of Maine in the case of State v. Crooker, 123 Me. 310, 122 A. 865, 33 A.L.R. 821:
>
> 'The constitutional right of confrontation does not mean merely that witnesses are to be made visible to the accused, but imports the constitutional privilege to cross-examine them.
>
> * * *
>
> 'The constitutional right of cross-examination is not a mere privilege to be granted or withheld at the discreation of the court, but a substantive right possessed by the accused.'

It is stated in 58 Am.Jur., page 350, Section 629, and we quote with approval:

"* * * It is error for the trial court to refuse to permit the cross-examination of a witness to extend to all matters germane to the direct examination, for such a cross-examination is a matter of absolute right and is not a mere privilege. * * * If a question is within the scope of direct examination it is not objectionable on cross-examination because it tends to establish a defense to the action."

It is further stated in the same work in Section 632, on page 352:

"* * * when the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts which constitute a unity, or to the specific facts developed by the direct examination. Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination. As has been stated, cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, suppliment, contridict, rebut or make clearer the facts testified to in chief by the witness on cross-examination. * * * "

The holding by this Court in the case at Bar is also in direct conflict with the decision of the District Court of Appeal, Second District of Florida, in the case of *Frost v. State,* 104 So.2d 77, in the following language:

"Either the defendant had or did not have the right to cross-examine the officer as to the point involved. If he had the right, then the Court's refusal to allow him to ask the questions which have or could have a decided effect upon the mind of the jury."

The holding in the case at Bar is also in direct conflict with the decisions of the District Court of Appeal,

Second District of Florida, in the case of *Watson v. State*, 134 So.2d 805 and *Beard v. State*, 104 So.2d 680, and in direct conflict with the decision of the District Court of Appeal, Third District of Florida, in the case of *Minturn v. State*, 136 So.2d 359.

We respectfully submit that this Honorable Court's holding that the Petitioner was not denied a fair trial by the limitations placed upon the defense counsel's cross examination of the prosecuting witness, in effect, did deprive your Petitioner of a fair and impartial trial as guaranteed to her by the Florida Constitution and the Fourteenth Amendment to the Federal Constitution.

WHEREFORE, Petitioner respectfully submits that that the Supreme Court's denial of Petitioner's Petition for a Writ Certiorari, in effect, held that your Petitioner was not denied a fair and impartial trial by the limitations placed upon defense counsel's cross examination which did, in effect, deprive your Petitioner of a fair and impartial trial as guaranteed to her by the Florida Constitution and the Fourteenth Amendment to the Federal Constitution. Petitioner respectfully prays this Honorable Court to reconsider its denial of Petitioner's Petition for a Writ of Certiofrari dated March 3, 1964, in the above styled cause, and upon said reconsideration, will grant unto Petitioner a Rehearing and her Petition for a Writ of Certiorari, as prayed.

Respectfully submitted,

LAW OFFICES OF
FRANK RAGANO

By: _____

Henry Gonzalez
416 Pierce Street
Tampa, Florida
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Petition for Rehearing have been furnished, by mail, to the Honorable James G. Mahomer, Assistant Attorney General, Supreme Court Building, Tallahassee, Florida, and, the Honorable Joseph E. Gillen, Clerk of the District Court of Appeal, Second District, State of Florida, Lakeland, Florida, on this 22nd day of January, A.D., 1964.

_____

Attorney

EXHIBIT B

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM A. D. 1964
WEDNESDAY, MARCH 25, A. D. 1964

DIAMANTE URGA, **
Petitioner **
vs. ** CASE NO. 32,839
STATE OF FLORIDA, **
Respondent **

On consideration of the Petition for Rehearing filed by Attorney for Petitioner,

IT IS ORDERED by the Court that the said petition be, and the same is hereby, denied.

A TRUE COPY,
TEST:
/s/ Guyte P. McCord
Guyte P. McCord
Clerk Supreme Court

(I HAVE TODAY MAILED TO THE CLERK OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, ORDER OF JANUARY 8, 1964, DENYING PETITION FOR WRIT OF CERTIORARI, IN THE ABOVE CAUSE.)

IN THE
CRIMINAL COURT OF RECORD IN AND FOR
THE COUNTY OF HILLSBOROUGH
STATE OF FLORIDA

STATE OF FLORIDA,

-vs- NO. 54832

DIAMANTE URGA

MOTION TO STAY MANDATE

COMES NOW your Defendant, DIAMANTE URGA, by and through her undersigned counsel, and moves this Honorable Court to Stay the Mandate heretofore issued in this cause, and for reason thereof alleges:

I

That on the 8th day of January, 1964, The Supreme Court of the State of Florida issued an Order denying the Petition for Writ of Certiorari in this cause, a copy of which is attached hereto and made a part hereof as Defendant's Exhibit "A".

II

That on the 25th day of March, 1964, The Supreme Court of the State of Florida issued an Order Denying Defendant's Petition for Rehearing, a copy of which is attached hereto and made a part hereof as Defendant's Exhibit "B".

III

That on the 2nd day of April, 1964, the Clerk of the Criminal Court of Record in and for Hillsborough County, Florida, received and docketed a Mandate from the District Court of Appeals, Second District of Florida, wherein and whereby it was demanded that the Defendant be taken into custody and that she begin to serve the sentence heretofore imposed by this Honorable Court.

IV

That your Defendant, by and through her undersigned counsel, will make application to The United States Supreme Court through the Extraordinary Writ of Certiorari, in accordance with Rules 11, 19, 21 and 22, Supreme Court Rules, Title 28, United States Code, and further, as provided under section 2101, Title 28, United States Code.

WHEREFORE, Defendant moves this Honorable Court to grant a hearing on this Motion and to issue a temporary Stay of the Mandate until such time as the hearing can be had; and furthermore,

Defendant moves this Honorable Court that, after said hearing, a permanent Stay Order of the Mandate heretofore filed in this cause be entered until such time as The United States Supreme Court makes final determination of this cause.

Respectfully submitted,

LAW OFFICES OF
FRANK RAGANO

By: _____

HENRY GONZALEZ
416 Pierce Street
Tampa, Florida

Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion has been furnished to the Honorable Paul B. Johnson, State Attorney, Hillsborough County Court House, Tampa, Florida, by delivery, this 6th day of April, 1964.

_____

Attorney

IN THE CRIMINAL COURT OF RECORD IN AND FOR THE COUNTY OF HILLSBOROUGH STATE OF FLORIDA.

STATE OF FLORIDA,
vs. NO. 54832.
DIAMANTE URGA,

ORDER

THIS CAUSE, coming on this day to be heard upon Petitioner's Motion to Stay Mandate, and the Court having heard arguments of counsel for the respective parties hereto, and the Court being otherwise fully advised in the premises, it is therefore,

ORDERED AND ADJUDGED, that the Mandate heretofore issued by the District Court of Appeal, second District, State of Florida, and filed and docketed by the Clerk of the above-entitled Court and the Capias for the commitment of the Petitioner, Diamante Urga, be, and the same is hereby stayed for a period of thirty (30) days from the date hereof, the same being in the possession of Ed Blackburn, Jr., Sheriff of Hillsborough County, Florida, and it is further

ORDERED AND ADJUDGED, that upon filing of the Petitioner's Petition for Writ of Ceritorari with the Clerk of the Supreme Court of the United States of America within a period of thirty (30) days from the date hereof, the aforesaid Mandate and the serving of the capias by Ed Blackburn, Jr., Sheriff of Hillsborough County, Florida, be and the same is hereby stayed until Petitioner's Petition for Writ of Certiorari has been disposed of by the Supreme Court of the United States of America.

DONE AND ORDERED in Chambers, at Tampa, Hillsborough County, Florida this 13th day of April, 1964.

/s/ Walter N. Burnside, Jr.
Judge Criminal Court
of record

APPENDIX B

FLORIDA STATUTES 22, Section 797.01

797.01 Performing abortion; punishment

Whoever with intent to procure miscarrage of any woman unlawfuly administers to her, or advises or prescribes for her, or causes to be taken by her, any poison, drug, medicine or other noxious thing, or unlawfully uses any instrument or other means whatever with the like intent, or with like intent aids or assists therein, shall, if th woman does not die in consequence thereof, be punished by imprisonment in the state prison not exceeding seven years, or by fine not exceeding one thousand dollars.